Supreme Court, U.S.
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No. 02-400

In the Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; AMERICAN INTERNATIONAL GROUP, INC.; CENTRA, INC.; CENTRAL TRANSPORT, INC.; AND GLS LEASCO OF MICHIGAN, INC.,
Petitioners,

v.

MARIE V. LYNCH, ADMINISTRATRIX OF THE ESTATE OF STEPHEN M. WILEY; AND SUSAN REESE, ADMINISTRATRIX OF THE ESTATE OF JUSTIN L. REESE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF *AMICI CURIAE* OF THE TRUCKING INDUSTRY DEFENSE ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The question presented in the Petition for Writ of Certiorari is:

> Whether the MCS-90 Endorsement, a federally mandated endorsement to a motor carrier's insurance policy, requires the insurance company to pay a judgment against a defendant that is not an insured under its policy.

CORPORATE DISCLOSURE STATEMENT

The Trucking Industry Defense Association (TIDA) is an international organization comprised of in-house counsel, claims and risk management professionals at trucking and truck insurance companies. The trucking companies span from common carriers to private fleets. TIDA provides assistance to the trucking industry on various issues regarding personal injury, property damage, and workers' compensation claims.

TIDA maintains a vested interest in the outcome of this litigation due to its potentially significant ramifications throughout the trucking industry.

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PETITION FOR WRIT OF CERTIORARI

Amicus Curiae Trucking Industry Defense Association (TIDA) respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio.

OPINIONS BELOW

The Opinion of the Supreme Court of Ohio is reported at 95 Ohio St. 3d 441 and 768 N.E.2d 1158. The Opinion of the Court of Appeals of Ohio is reported unofficially at 2000 Ohio App. LEXIS 5771 and 2000 WL 1804347. The entry of judgment of the Ohio Court of Common Pleas is not reported.

JURISDICTION

The Opinion of the Supreme Court of Ohio was issued on June 12, 2002. That Opinion reinstated the trial court's declaratory judgment that there was insurance coverage under the policy at issue here. That declaratory judgment had been certified by the trial court as a final judgment under Ohio R. Civ. P. 54(B). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The ICC Termination Act of 1995 is codified at 49 U.S.C. §13901-13908 and 31139. Pertinent provisions are reprinted at App. 30a. The regulations promulgated thereunder are published at 49 C.F.R. §387.1-387.419. Pertinent provisions are reprinted at App. 34a. The MCS-90 Endorsement, set forth at 49 C.F.R. §387.15, is reprinted at App. 35a.

STATEMENT OF THE CASE

Amicus Curiae Trucking Industry Defense Association ("TIDA") is an international organization comprised of in-house counsel, claims and risk management professionals at trucking and trucking insurance companies. The trucking companies span from common carriers to private fleets. TIDA provides assistance to the trucking industry on various issues regarding safety, risk management, personal injury, property damage and workers' compensation claims. TIDA has a vested interested in the outcome of this litigation due to the potentially significant ramifications this decision will have upon the industry as a whole.

TIDA hereby joins in the Statement of Case previously set forth by Petitioners in the Petition for Writ of Certiorari, in its entirety.

TIDA's members, both those involved in the insurance aspects of the trucking business as well as those involved in the operation of motor carriers, have a substantial interest in the Ohio Supreme Court's Decision in this matter. Essentially, the Ohio Supreme Court has held that pursuant to the federally mandated MCS-90 Endorsement, the liability insurer of a motor carrier and ultimately the motor carrier itself through the MCS-90 Endorsement's reimbursement provisions, are directly financially responsible for motor vehicle accident damages caused entirely by other motor carriers who are not insureds under the subject policy, despite the fact that the innocent motor carrier is not even alleged to have played any causal role in the occurrence of the accident or resulting damages.

All of the Members of TIDA have a substantial interest in the Ohio Supreme Court's holding in this matter

because it represents a recurring misapplication of the carefully structured federally mandated financial responsibility scheme which results in substantial losses being incorrectly borne by innocent motor carriers and/or their insurers. One of the single most substantial expenses associated with operation of any trucking business is the implementation of adequate financial responsibility, as mandated by federal law. The vast majority of motor carriers satisfy the financial responsibility requirement through liability insurance coverage such as that purchased by Centra Inc., from Petitioner National Union in the present matter.

The federally mandated financial responsibility scheme is structured, consistent with the most fundamental tort concepts, such that the at fault motor carrier bears the ultimate financial losses arising from trucking accidents. 49 C.F.R. § 387.1 *et seq*. Although the loss may initially be paid by the liability insurer, it is ultimately transferred to the at fault motor carrier through the adjustment of premiums over time based upon the motor carrier's loss history and/or by operation of the reimbursement provisions of the MCS-90 Endorsement. Imposition of the ultimate cost of a motor vehicle accident upon the at fault motor carrier, in addition to effectuating the fundamental fairness that the responsible party be held accountable, also serves a very important public policy by ultimately forcing irresponsible and unsafe motor carriers out of business through escalating premium costs and/or the inability to procure insurance coverage. Elimination of irresponsible and unsafe motor carriers through higher expenses, while allowing responsible and safe motor carriers to enjoy the lower premiums associated with proper operation of their fleets, makes our highways a safer and more efficient means of transportation.

The Ohio Supreme Court's decision in this matter, like that of the Ninth Circuit Court of Appeals in *John Deere v. Guillermo Nueva*, 229 F.3rd 853 (9th Cir. 2000), defeats the important public policy of safer highways created by the federal financial responsibility requirements, by imposing the costs of trucking accidents upon innocent, uninvolved motor carriers. Imposition and spreading of trucking accident costs to innocent, uninvolved motor carriers completely defeats the important public policy underlying the carefully structured federal financial responsibility system.

In addition to improperly punishing innocent, uninvolved motor carriers, the Ohio Supreme Court's decision in this action also imposes risks upon the liability insurer of the innocent motor carrier which could never have been anticipated or accounted for in the underwriting process. When analyzing whether to issue liability coverage to a motor carrier, insurers consider the motor carrier's business operation, safety policies, drivers, assets and loss history. Based upon this information, the insurer then decides whether it will issue liability coverage to the motor carrier and if so the amount of premium to charge. Because the Ohio Supreme Court has imposed an indemnity obligation on National Union for a motor vehicle accident in which National Union's insured was uninvolved, there is no conceivable way National Union could have ever contemplated this substantial additional risk when deciding whether to issue coverage to Centra, Inc., or when calculating the premium.

As is set forth at length in the Petition for Writ of Certiorari and the Appendix, the Department of Transportation agrees that the rationale and conclusion of the Ohio Supreme Court as well as the Ninth Circuit's decision in *John Deere, supra.*, are clear and direct misapplications of the language and intended purpose of the MCS-90 Endorsement.

Insurers and the trucking industry have structured their respective business operations in reliance on the correct application of the MCS-90 Endorsement.

The practical ramifications of the expanded scope of potential unknown and unanticipated insureds created by the Ohio Supreme Court's holding necessarily will result in increased premiums industry wide to accommodate the expanded risks. Such increased premiums in an industry already burdened by high insurance costs and high fuel costs will cause many smaller motor carriers to be unable to compete, will increase the costs of transporting freight and overall will have a significant negative impact, not only on the trucking industry, but also on the economy in general. As is made clear by the express language of the MCS-90 Endorsement, the pertinent federal regulations, and the Department of Transportation's *Amicus* Brief submitted to this Court in *John Deere, supra.*, this is neither the purpose nor the intent of the MCS-90 Endorsement.

In this action, there are no allegations that the trailer owner, Centra, Inc., was negligent in any manner or played any causal role in the occurrence of the accident. The Respondents have pursued the culpable motor carrier and its driver which maintained $1,000,000 of liability coverage for this accident in compliance with the federal financial responsibility requirements. No judgment has or could be entered against National Union's insured, Centra, Inc. Nonetheless, the Ohio Supreme Court incorrectly employed the MCS-90 Endorsement to rewrite the substantive terms and provisions of the National Union policy regarding who is an insured, despite the fact that the MCS-90 Endorsement is not in conflict with the policy's definition of an insured.

This has become a frequently reoccurring issue nationally. Therefore, this Honorable Court should grant certiorari to review this issue and the decision of the Ohio Supreme Court.

REASONS FOR GRANTING THE WRIT

I. THE MCS-90 ENDORSEMENT DOES NOT ALTER THE TERMS OF THE UNDERLYING POLICY OF INSURANCE AND IS NOT AVAILABLE FOR JUDGMENTS AGAINST NON-INSUREDS.

As is set forth in 49 C.F.R §387.15, the MCS-90 Endorsement is separate and distinct from the underlying liability insurance policy. It only operates in circumstances where the terms of the underlying insurance policy would preclude an indemnity obligation which is required by the federal regulations set forth in 49 CFS §§387.1-387.17. Thus, the analysis of whether indemnity is owed for a particular accident is two fold. First, the language of the underlying policy must be reviewed to determine whether indemnity is owed. In this action, it is correctly undisputed that, pursuant to the language of the National Union policy, National Union has no indemnity obligation for Respondent's tort claims against Lawrence B. Yob and Bath Transport, Inc.

Second, the language of the MCS-90 Endorsement, in conjunction with related federal regulations, must be analyzed to determine whether indemnity is owed based upon the facts of the particular accident. It is respectfully submitted that neither the language of the MCS-90 Endorsement nor the related federal regulations mandate any indemnity obligation on behalf of National Union for the underlying accident.

Although the language of the MCS-90 Endorsement expands the indemnity obligation with respect to non-scheduled vehicles, it does not in any manner alter or change the identity of those insured in the underlying insurance policy.

Definitions set forth in 49 C.F.R §387.3 make clear that only the motor carrier named in the policy of insurance is an insured under the MCS-90 Endorsement. In this regard, the term "insured and principal" is defined in 49 CFS §387.3 as,

> the motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier.

Id.

Clearly the term "insured" for purposes of subpart §387.1-387.17 is the "motor carrier named in the policy of insurance . . . " When this definition is applied to the MCS-90 Endorsement, it is evident that no indemnity obligation to non-insureds, such as Mr. Yob and Bath Transport, Inc., is owed under the MCS-90 Endorsement.

As is explained by the Department of Transportation in its *Amicus Brief* to this Court in *John Deere, supra.*, the reasoning of the Ohio Supreme Court and the Ninth Circuit's Decision in *John Deere*, are flawed as they inter-mix the unrelated concepts of "covered autos" and the determination of who is an insured. It is only by improperly re-writing the policy language that the Ohio Supreme Court reaches its conclusion. There is no language in the MCS-90 Endorsement nor in the related federal regulations that states or implies the policy language shall be altered, changed, or

modified in any way. To the contrary, policy provisions which conflict with the indemnity obligations prescribed by the federal regulations are simply void and unenforceable. However, in this case, as is explained more fully in the Department of Transportation *Amicus Brief* in *John Deere, supra.*, there is not and can not be any conflict between the MCS-90 Endorsement and the policy's definition of an insured because the MCS-90 Endorsement does not address this issue.

Because the Ohio Supreme Court's holding is in direct conflict with the public policy expressed by the Department of Transportation through the federal regulations and more recently in its *Amicus Brief* to this Court in *John Deere, supra.*, and because that holding has such far reaching ramifications, this Honorable Court should grant certiorari.

II. THE DECISION BY THE OHIO SUPREME COURT CONTRADICTS THE DEPARTMENT OF TRANSPORTATION'S INTERPRETATION OF ITS OWN REGULATIONS AS WELL AS THE DECISIONS OF OTHER CIRCUITS AND STATE COURTS OF LAST RESORT.[1]

The significance of the conflict currently existing among the various circuits and the Ohio Supreme Court on this issue is illustrated by the fortuitous occurrence of the accident at issue. Had the accident not occurred on the Ohio

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[1] With respect to the Ohio Supreme Court's conflict with the Department of Transportation's Interpretation of its regulations, TIDA hereby incorporates by reference Petitioner's Petition for Writ of Certiorari.

Turnpike but had instead occurred on the Pennsylvania Turnpike only a few miles away, the outcome of National Union's indemnity obligation under the MCS-90 would have been decided in a directly contradictory manner. In this regard, the Third Circuit Court of Appeals addressed this issue in *Carolina Casualty Insurance Company v. Insurance Company of North America*, 595 F.2d 128 (3d Cir. 1979). In *Carolina Casualty,* the Third Circuit Court of Appeals held that the BMC-90 Endorsement (predecessor to the MCS-90 Endorsement)[2] applied only to the named insured. In *Carolina*, Stanford was the owner of the tractor and was insured by Carolina Casualty. Refrigerated Transport Company, while insured by the Insurance Company of North America, ("INA") leased the tractor from Stanford. *Id.,* at 130. Stanford provided a driver to Refrigerated Transport Company in conjunction with the lease. The leased vehicle was involved in an accident while hauling cargo on behalf of Refrigerated Transport and while displaying the ICC placards of Refrigerated Transport. *Id.,* at 129. The plaintiff sued both Stanford and Refrigerated Transport, and their respective insurers filed separate declaratory judgment actions to determine coverage.

In over turning the decision of the District Court and holding that the BMC-90 Endorsement attached to the INA policy imposed no obligation upon INA (Refrigerated Transport's insurer) with respect to the permissive user, Stanford. The Court reasoned:

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[2] The cases from the 1970's concern the "BMC-90" Endorsement, while those since the early 1980's involve the successor form, MCS-90. However, with respect to this issue there are no material distinctions. See *Canal Insurance Company v. First General Insurance Company*, 889 F.2d 604, 611 (5th Cir. 1989).

> In the case before us, we find in particular that neither the federal motor carrier laws nor the (imputed) ICC Endorsement nor Paragraph 3 of Refrigerated's trip lease, transferred to Refrigerated the duties to defend claims properly brought against others or to pay judgments entered against others. 49 U.S.C. §315 [now 49 U.S.C. §10927] and 49 C.F.R. §1043.1 (a), governing insurance and other assurances of motor carriers' financial responsibility, require only that the carrier give security "to pay any final judgment recovered against such motor carrier . . ."; they mention nothing about defense of actions and nothing about payment of judgment recovered against the other parties such as lessors.

Id., at 139. Thus, INA was not responsible for any indemnity obligation on behalf of Stanford under the federal endorsement.

Given the Third Circuit's holding that these federally mandated endorsements do not modify or otherwise extend coverage to parties not named as insureds, such as Mr. Yob and Bath Transport, Inc., had the accident at issue occurred across the border in Pennsylvania, National Union would not have any indemnity obligation.

In *Wellman v. Liberty Mutual Insurance Company*, 496 F.2d 131 (8th Cir. 1974), Liberty Mutual insured Morgan Drive-Away. Mitchell owned and operated the vehicle which had been leased to Morgan and which displayed Morgan's ICC placards. *Id.*, at 132. While operating the vehicle, Morgan was involved in an accident causing injury to

Wellman. Wellman commenced an action against Mitchell and Morgan. However, Morgan was dismissed from that action. Default judgment was taken against Mitchell, the owner-operator and Wellman then attempted to collect from Liberty Mutual, Morgan's insurer.

The Eighth Circuit held that Mitchell was not covered under the Liberty Mutual policy, nor by the ICC endorsement:

> The relevant ICC regulation on insurance, 49 C.F.R. §1043, contains no provisions which would require a motor carrier specifically to carry insurance affording liability coverage for judgments rendered solely against an owner-operator of a vehicle leased to the motor carrier. *Id.*, at 138. Because no judgment was entered against Morgan, the ICC endorsement did not impose any indemnity obligation upon Liberty Mutual for the judgment against non-insured owner operators:
>
> * * *
>
> Had the Wellmans obtained a state court judgment against Morgan, the result in this case would have been different, for the insurance policy would clearly have covered Morgan as the "named insured" even though its liability would be vicarious and statutorily derived.

Id., at 138-139.

Additionally, other Circuits have adopted the same rationale as the Third and Eighth Circuits, in direct conflict with the Ninth Circuit's decision and the Ohio Supreme Court's decision. See *White v. Excalibur Insurance Company*, 599 F.2d 50, 55 (5th Cir.) cert denied., 444 U.S. 965 (1979) (holding plaintiff could recover from the insurer under federal law only if she had obtained a judgment against the insured); *Nowak v. Transport Indemnity Company*, 120 Wis. 2d 635, 358 N.W. 2d 294, 296 (Wis. Ct. App. 1984) (holding a "final judgment recovered against the insured" refers only to a judgment entered against a named insured motor carrier); *Transport Indemnity Company v. Teter*, 575 S.W. 2d 780, 785 (Mo. Ct. App. 1978) (rejecting the argument that the federal endorsement should be read in conjunction with the "who is an insured"clause of the policy; rather, the endorsement stands on its own and is triggered only by a judgment against the named insured); *National Mutual Insurance Company v. Liberty Mutual Insurance Company*, 196 F.2d 597, 600 (D.C. Cir.) cert. denied, 344 U.S. 819 (1952); *Jackson v. O'Shields*, 101 F.3d 1083, 1085 (5th Cir. 1996); *John Deere Ins. Co. v. Truckin' U.S.A.*, 122 F.3d 270, 275 (5th Cir. 1997); *Kesler v. Thedford*, 670 So. 2d 467, 471 (La. Ct. App.) cert. denied 675 So. 2d 1085 (La. 1996); *Progressive County Mut. Ins. Co. v. Carway*, 951 S.W.2d 108, 113 (Tex. App. 1997).

Similar to the cases cited above, a judgment has not been rendered against National Union's insured, Centra, Inc. As these cases have held, the MCS-90 Endorsement is not applicable unless a judgment has been rendered against a named insured. Because the Ohio Supreme Court has ignored these precedents and has not followed the Department of Transportation's own interpretation of the applicable regulations, certiorari should be granted.

III. PUBLIC POLICY CONSIDERATIONS REQUIRE THAT THE OHIO SUPREME COURT'S DECISION BE REVIEWED.

Common to all motor carriers is the requirement for adequate financial responsibility for potential liability such as that arising from the subject motor vehicle accident. Most motor carriers satisfy this requirement through liability insurance coverage. Liability insurance coverage is one of the single most substantial expenditures for many motor carriers.

Like other forms of insurance, liability insurance is based upon a calculation of risk. Of paramount importance in this analysis is the amount of risk as determined by the policy's monetary limits of liability, as well as the scope of risk as determined by numerous factors associated with the manner in which the insured operates. Among these factors, insurers take into account the risk exposure created by the MCS-90 Endorsement. Creation of an indemnity obligation such as that effectuated by the Ohio Supreme Court's decision in this case, makes an accurate evaluation of the risk impossible to determine. The attendant additional risk for conduct and activities of non-insureds, whose business operation, safety policies, drivers, and loss history were completely unknown to the insurer when the policy was issued, dramatically distorts the risk accepted by National Union in the underwriting analysis. It effectively prevents an insurer from ever performing an accurate and comprehensive projection of risk. This is so because there are literally an infinite number of potential persons or entities who the insurer could be obligated to indemnify under the Ohio Supreme Court's holding. Clearly, as set forth more fully above, this infinite scope of risk was not intended nor mandated by the applicable federal regulations.

The federally mandated financial responsibility requirements are structured such that the at-fault motor carrier bears the ultimate financial losses arising from trucking accidents. Imposition of the ultimate cost of a motor vehicle accident upon the at-fault motor carrier through higher insurance premiums serves the very important public policy of weeding out irresponsible and unsafe motor carriers through escalating insurance premiums and/or the inability to procure insurance coverage. Elimination of such irresponsible and unsafe motor carriers in this manner makes our highways safer.

Conversely, imposing the cost of motor vehicle accidents on innocent, uninvolved motor carriers[3] defeats this weeding out process and simply spreads the cost industry-wide. This allows unsafe motor carriers to escape the total cost of their own culpable conduct. These higher industry-wide costs will then be passed on to consumers in the form of higher transportation fees and generally have an adverse effect on the economy as a whole. Further, smaller motor carriers that operate on already existing tight margins will have the additional burden of paying losses created by other culpable motor carriers in the form of higher insurance premiums industry-wide. For many smaller innocent motor carriers, this additional cost will be too great and will force them out

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[3] The reimbursement provisions of the MCS-90 mandate that the named insured reimburse the insurer for indemnity payments imposed by the MCS-90 but which were not created by the insurance policy itself. Thus, the innocent, uninvolved motor carrier ultimately may bear the loss. Further, as is explained above, even if the innocent, uninvolved motor carrier does not directly reimburse the liability insurer through the MCS-90, it will ultimately pay for the loss through higher insurance premiums in the future.

of business, leaving other unsafe motor carriers free to operate. As a result, innocent motor carriers will be forced out of business, leaving other unsafe motor carriers free to operate.

It is respectfully submitted that this case presents a compelling question previously unaddressed by this Honorable Court that has wide-reaching public ramifications. Thus, certiorari should be granted so that the Ohio Supreme Court's decision can be reviewed and reconciled with the conflicting authorities, the plain language of the pertinent federal regulations and the Department of Transportation's interpretation of those regulations.

CONCLUSION

Based upon the foregoing facts, authorities and arguments, it is respectfully submitted that the Petition for Writ of Certiorari by National Union Fire Insurance Company of Pittsburgh, PA, American International Group, Inc., Sentra, Inc., Central Transport, Inc., and GLS Leasco of Michigan, Inc., should be granted.

Respectfully submitted,

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